

Liu (Migration) [2020] AATA 5399 (30 October 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Ms Meiling Liu Mr Qinglong Fan
CASE NUMBER:	1832780
HOME AFFAIRS REFERENCE(S):	BCC2016/1521674
MEMBER:	Christine Kannis
DATE:	30 October 2020
PLACE OF DECISION:	Perth
DECISION:	The Tribunal remits the applications for Partner (Migrant) (Class BC) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 100 (Partner) visa: • cl.100.221(2)(b) of Schedule 2 to the Regulations • The ability of the second named visa applicant to satisfy the secondary criteria should be reconsidered.

Statement made on 30 October 2020 at 6:18am

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CATCHWORDS

MIGRATION – Partner (Migrant) (Class BC) visa – Subclass 100 (Partner) – genuine and continuing relationship – pooling of salaries and income – joint responsibility for child and household – joint family events – practical and emotional support – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cl 100.221; r 1.15

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 2 November 2018 to refuse to grant the visa applicants Partner (Migrant) (Class BC) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the applicant) applied for the visa on 26 June 2015 on the basis of her relationship with her sponsor, Mr Scott Rogers. At that time, Class BC contained one subclass: Subclass 100 (Partner). The second named applicant is the applicant's 20-year-old son.
3. The criteria for the grant of a Subclass 100 visa are set out in Part 100 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The visas were refused on the basis that the applicant did not meet cl.100.221(2)(b) because the delegate was not satisfied that the applicant was the spouse or de facto partner of the sponsor. As the applicant did not meet the requirements of cl.100.221(2)(b), the second named visa applicant could not meet the secondary criteria.
5. The applicant appeared before the Tribunal by video conference on 12 October 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor by video. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
6. The applicant was represented in relation to the review by her registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether, at the time of this decision, the applicant is the spouse of the sponsoring partner pursuant to cl.100.221(2)(b).
9. In considering this issue the Tribunal has had regard to all documents on the Department's and the Tribunal's files, as well as the oral evidence given at the hearing.
10. **Whether the parties are in a spouse or de facto relationship**
11. Clause 100.221 requires that the applicant meet one of five alternative requirements. These include cl.100.221(2) and (2A) which require, among other things, that at the time of this decision, the applicant is the spouse or de facto partner of the 'sponsoring partner'. Unless the applicant was granted a Subclass 309 visa by Ministerial intervention, the 'sponsoring partner' is the person who was specified as the applicant's spouse or de facto partner or intended spouse or de facto partner in the related Subclass 309 application, being an Australian citizen, permanent resident or eligible New Zealand citizen.
12. The sponsor is an Australian citizen by birth.

13. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)–(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship; the nature of the household and the persons' commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
14. The evidence before the Tribunal included a Marriage Certificate issued by the Commonwealth of Australia indicating that the parties were married on 16 November 2014. The Tribunal was satisfied that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
15. Prior to the hearing the Tribunal received written statements signed by the applicant and the sponsor (the joint statement), the sponsor's father and the sponsor's sister. The written statements were dated 28 September 2020.
16. The Tribunal considered the r.1.15A(3) matters.

17. *Financial aspects of the relationship*

18. The Tribunal considered the evidence in relation to the financial aspects of the parties' relationship including the joint ownership of assets, any joint liabilities, the extent of pooling of financial resources, any legal obligations owed to the other party and any sharing of day-to-day household expenses.
19. In the joint statement dated 28 September 2020 the parties said they each have a personal bank account as well as a joint bank account. They said both their salaries/income goes into the joint account and said the applicant is in charge of the sponsor's personal account.
20. The applicant told the Tribunal she operates a family massage business from home however she does not have much work and some days she has no clients at all. She deposits any income from her business into the joint account. Sometimes clients pay her in cash and sometimes they transfer money into her personal account, and she transfers it into the joint account. She said the sponsor is in full-time employment and his salary is paid into the joint account. The applicant said prior to 2020 the sponsor's salary was paid into his personal account and funds were then transferred from that account into the joint account. The applicant said their living expenses are paid from the joint account. She said she contributes to their living expenses when she can however the sponsor financially supports her and the second named visa applicant.
21. Bankwest statements for periods in 2019 for an account in the parties' joint names were provided. The credit transactions include transactions described as "from scott acc" and "Meiling Liu Home". The debit transactions include food, alcohol, petrol and chemist purchases and payment of expenses such as rent and telephone. Following the hearing the applicant provided bank statements for the joint account for the period 3 July 2020 to 2 October 2020. These statements showed the sponsor's salary is paid into the joint account and the debit transactions include purchases at Coles, Woolworths, IGA and Vodafone.

22. When asked whether she and the sponsor had any joint assets the applicant told the Tribunal that when she learnt to drive in 2018, the sponsor bought a car for her. Evidence of this purchase was provided.
23. A Charges and Voluntary Contributions 2019 document issued by Geraldton Senior High School in respect to of the second named visa applicant and addressed to the sponsor was provided.
24. The Tribunal accepted the parties' evidence that they pool their salaries/income and pay for joint expenses from the joint account. The Tribunal decided that these are indicators of a spousal relationship at the time of decision.

25. *Nature of the household*

26. The Tribunal considered the evidence in relation to the nature of the household including any joint responsibility for care and support of children, the parties' living arrangements and any sharing of housework.
27. In the joint statement the parties said the applicant does most household chores such as cooking, washing and cleaning. They said she does most of the housework because her massage business is not busy, and the sponsor works from 5.30 am to 4pm. They said they look after the garden together and go to Bunnings together. They said the sponsor sometimes cooks and said the barbeque is his job. The parties confirmed the division of household duties at hearing.
28. In the joint statement the parties said that when the second named visa applicant arrived in Australia in August 2016, he could not speak English. Therefore, he and the applicant lived in Perth from August 2016 to November 2017 to undertake an intensive English language course as no course was available in Geraldton. The parties said the sponsor remained in Geraldton for employment reasons. They stated that during this time the sponsor often travelled to Perth to visit the applicant and the second named visa applicant and during school holiday periods they returned to Geraldton.
29. A letter dated 11 March 2019 from Ray White Geraldton, in relation to the tenancy at George Road, Geraldton WA, addressed to the applicant, the second named visa applicant and the sponsor was provided. At hearing the applicant confirmed that she and the sponsor currently reside at this address. The second named visa applicant travelled to China in November 2019 and, in accordance with his Bridging visa conditions, was due to return within three months. He has not been able to return to Australia due to the COVID-19 pandemic and is still in China. He will return to live with the applicant and the sponsor when the borders are re-opened.
30. Correspondence addressed to the applicant and to the applicant and sponsor jointly at George Road, Geraldton WA in 2019 was provided. 01:49:06
31. The Tribunal finds that the nature of the household of the applicant and the sponsor at the time of decision is an indicator of a genuine and continuing spousal relationship.

32. *Social aspects of the relationship*

33. The Tribunal considered the evidence in relation to the social aspects of the relationship including whether parties represent themselves to other people as being in a spousal relationship with each other, the opinion of friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities.

34. In the joint statement the parties stated that almost every month they organise a barbeque party and invite friends to their home.
35. Photos of the parties with the sponsor's father, the sponsor's son (from a previous relationship), the sponsor's sister and friends were provided. Many of the photos showed the parties sharing a meal or holidaying with family members or friends. Photos of the sponsor with the second named visa applicant were provided. These included photos of the sponsor teaching the second named visa applicant to drive and to swim. Photos of the applicant with the sponsor's son's newborn baby were provided. The photos were dated in 2018, 2019 and 2020.
36. Prior to the hearing the Tribunal received written statements signed by the sponsor's father, Mr Daryl Rogers and the sponsor's sister, Ms Sherrie Rogers. In his statement Mr Daryl Rogers said the parties were married at his and his late wife's home. He said he often visits the parties and stays with them for three or four nights each time. He said that when he stays with the parties the applicant cooks for him and buys him special treats. He said he feels warmly welcomed by the parties.
37. In her statement Ms Sherrie Rogers said the sponsor introduced her to the applicant in early 2014. She said her mother was suffering with cancer at the time. She said when the applicant and the sponsor travelled from Geraldton to Perth to visit her mother, the applicant was very kind and often spent long periods massaging the lymphedema on her mother's legs. Ms Sherrie Rogers said her mother was in a wheelchair when the parties married but she was pleased to see the sponsor finally happy. She said when her mother passed away the applicant was kind and supportive to all the family. She said the applicant has always treated her warmly and welcomed her and her family. Ms Sherrie Rogers said the applicant takes care of the sponsor's two grandchildren and often sends her photos of them.
38. Written statements made by the sponsor's two sons (from a previous relationship), Luke Rogers and Zack Rogers were provided. These statements attest to their father's happiness with the applicant and both refer to the care she also provides to Luke's infant son.
39. The applicant's Individual Tax Return (ITR) 2020 was provided. The applicant indicated that the sponsor was her spouse for the relevant financial year.
40. The sponsor's Australian Super superannuation statement shows the applicant is his sole nominated beneficiary.
41. The applicant and the second named visa applicant departed Australia for several weeks in 2018. The applicant told the Tribunal they returned to China to celebrate Chinese New Year. She said the sponsor always says he will go to China with her "next time", however he has no interest in travel and does not have a passport.
42. The Tribunal accepted the parties' written and oral evidence that they represent themselves to other people as being married to each other and that they engage in joint social activities at the time of this decision. The Tribunal gives weight to the evidence of the social aspects of the relationship.
43. *Nature of persons' commitment to each other*
44. The Tribunal considered the nature of the persons' commitment to each other including the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other, and whether they see the relationship as long-term.

45. In the joint statement the parties said the applicant is able to calm the sponsor down when he is tired or upset about something. They provided the example of the sponsor becoming depressed when the applicant's Partner visa was refused. They said the applicant comforted the sponsor and he felt better. At hearing the applicant explained that when the Partner visa was refused both she and the second named visa applicant were upset. She said however that the sponsor broke down and stayed in bed and did not eat. She said she told him not to worry and suggested they find a lawyer to help them. When asked about the comfort the applicant provides him, the sponsor told the Tribunal that she has a good way with words and thinks outside the box. He said she talks him down when he is upset.
46. The applicant told the Tribunal that apart from when the Partner visas were refused, she has not been sad at any time during her relationship with the sponsor. When asked about the support he provides, she said he sometimes takes on extra work on a Saturday so that he can earn additional income to give her and the second named visa applicant a good life.
47. The photos provided included a photo of the sponsor visiting the applicant in hospital in September 2019 and bringing her food.
48. In the joint statement the parties said when the partner of the sponsor's son (Luke) was unwell, the applicant took over the care of their young child (Kade) including overnight and weekend care. They said Kade often stayed three or four nights a week during his first four months of life. They said Kade, now aged 18 months, still runs to the applicant when he sees her. At hearing the applicant confirmed that she looks after Kade when Luke and his partner go out.
49. In the sponsor's Last Will and Testament, executed on 4 October 2018, the applicant is named as the sole beneficiary if she survives him by 30 days.
50. The delegate noted photos of "Christmas party with sponsor's family" showed some of the persons present wearing the same clothing as those in other photos dated October 2016. The Tribunal noted that the applicant and the second named visa applicant had the same tops in both photos. The Tribunal noted however that in the October 2016 photo the sponsor was wearing a watch on his left hand and in the Christmas party photo his left hand and arm was bandaged, and no watch is visible. When asked about wearing the same clothing in both photos the sponsor told the Tribunal that he has a very limited wardrobe and most of his clothes are work clothes. The Tribunal accepts this evidence and finds that the sponsor simply wore the same article of clothing on two separate occasions.
51. The delegate noted the joint bank statement for the period 3 July 2018 to 2 October 2018 showed debit transactions for an online dating service (\$25 per month) and an online provider of marketing and monetization services for sexually explicit webcam operators (\$54 per month). The sponsor made a statutory declaration on 25 May 2019 in which he explained these transactions. He declared that a friend had visited him for a few beers and had wanted to find a lady friend. He said the friend asked to use his computer and debit card to sign up to the dating site. He said the friend left him cash as payment. The sponsor said he only knew the friend as Woody and said he drops in when he is passing through town. In the joint statement the parties said the sponsor's mate from the bush used the sponsor's computer and debit card to subscribe to an adult website. The parties said the sponsor was unaware of this and if he had "felt anything was wrong with his debit card, he would not have submitted all bank statements to the department" with the application. They said the sponsor was unaware monthly fees were deducted from the debit card. At hearing the sponsor told the Tribunal that he has a few mates who drop in from time to time. He said the friend in question was a "bushie" and he has not seen him since he visited and used his computer and debit card. The sponsor said he did not check his bank statements and said he was glad

the delegate had brought the matter to his attention. In his statutory declaration the sponsor said he immediately cancelled the card upon learning of the monthly deductions.

52. The Tribunal makes no findings regarding the debit transactions showing payments to dating and webcam sites. The Tribunal has concerns regarding the sponsor's evidence in relation to the transactions for the following reasons. First, the sponsor has not identified his friend's name, apart from Woody. The transactions occurred over two years ago and he said this friend has not visited him since that time. Second, the sponsor said on learning of the transactions he cancelled the debit card however the joint account number in 2018 and in 2020 remains the same. Despite these concerns, the Tribunal is satisfied that at the time of this decision the sponsor has a commitment to a shared life with the applicant.
53. The Tribunal is satisfied, considering all of the evidence cumulatively, that the parties demonstrate a level of commitment to one another and to their spousal relationship as contemplated in the Regulations. The Tribunal places weight on the evidence of the nature of each person's commitment to the other.

Conclusion

54. In this case, although the delegate had concerns about several aspects of the parties' relationship including how the applicant financially supported herself when she resided in Perth from August 2016 to November 2017 and the debit transactions for dating and webcam sites, the Tribunal has concluded that these concerns do not outweigh the other evidence before the Tribunal at the time of decision.
55. The Tribunal accepts that there is a joint pooling of financial resources and sharing of day-to-day expenses. The Tribunal accepts that the parties have lived together and continue to live together under household arrangements consistent with a spousal relationship. The Tribunal accepts the evidence of family members as to their genuine opinion about the couple, and accepts - based on the consistency in the evidence before it - that there is support and recognition of their relationship by the sponsor's family and that the applicant and sponsor undertake social activities together.
56. The applicant and the sponsor generally gave oral evidence at hearing in a forthright and credible manner. The Tribunal placed weight on the social aspects of the relationship and the nature of the parties' commitment to each other.
57. Regarding whether the requirements of s.5F are met at the time of decision, the Tribunal decided:
- the parties are married to each other under a marriage that is valid for the purposes of the Act;
 - they are living together;
 - they have a mutual commitment to a shared life as husband and wife to the exclusion of others; and
 - that the relationship is genuine and continuing.
58. Accordingly, the Tribunal finds that, at the time of this decision, the applicant is the spouse, within the meaning of s.5F, of the sponsoring partner and meets the requirements of cl.100.221(2)(b) of Schedule 2 to the Regulations.

59. As the Tribunal has found that the applicant meets the criterion in cl.100.221(2)(b), the ability of the second named visa applicant to satisfy the secondary criteria should also be reconsidered.
60. Given the findings above, the appropriate course is to remit the application for the visas to the Minister to consider the remaining criteria for a Subclass 100 visa

DECISION

61. The Tribunal remits the applications for Partner (Migrant) (Class BC) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 100 (Partner) visa:
- cl.100.221(2)(b) of Schedule 2 to the Regulations
 - The ability of the second named visa applicant to satisfy the secondary criteria should be reconsidered.

62.

Christine Kannis
Member

63.

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).